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ATTORNEY FOR APPELLEES:

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FRED PFENNINGER and
CUMMINS MICHIGAN, INC.,¹

VS.

No. 49A05-0803-CV-133

GREAT LAKES DRILLING, INC. and)
 DIVERSIFIED BLAST HOLE, DRILLING, INC.,)
)
 Appellees.)

December 5, 2008

BAILEY, Judge

¹ Cummins Michigan, Inc. is not seeking relief on appeal. Pursuant to Indiana Appellate Rule 17(A), however, a party of record in the trial court is a party on appeal.

Case Summary

Appellant Fred Pfenninger appeals sanctions imposed by the trial court for Pfenninger's conduct as an attorney in a lawsuit involving Appellees Great Lakes Drilling, Inc., and Diversified Blast Hole, Drilling, Inc. (collectively, "Diversified"). We affirm in part, reverse in part, and remand.

Issues

Pfenninger raises a laundry list of issues² on appeal, which we consolidate and restate:

- I. Whether the trial court judge was required to recuse himself;
- II. Whether he was denied due process because he did not receive notice of the second hearing regarding attorney's fees; and
- III. Whether the trial court abused its discretion in imposing a trebled sanction against Pfenninger.

Facts and Procedural History

This is the second appeal of this case. In the prior appeal, another panel of this Court delineated the underlying facts as follows:

Diversified is a drilling company that uses big drill rigs to drill into bedrock. Diversified took one of its engines into Cummins for repairs, and a dispute arose over the propriety and cost of the repairs. On July 10, 2001, Cummins filed suit against Diversified for non-payment of the repair bill.

Cummins and Diversified entered into settlement negotiations, and they reached an oral agreement on August 18, 2003. The following day, Diversified sent to Cummins a check for \$16,555 and a letter memorializing the settlement agreement as follows:

² Pfenninger lists issues of whether Diversified did not support its claims for attorney's fees and whether the attorney's fees awarded were excessive. However, in the argument section of his appellate brief, Pfenninger simply sets out these issues without developing any argument with citations to authority and the record. Therefore, Pfenninger has waived these issues for failing to develop a cogent argument. See Ind. Appellate Rule 46(A)(8)(a).

(1) Cummins may pick up the engine core at issue in this case from Diversified's place of business . . . on or after September 15, 2003, with prior notice to Diversified. Alternately, and at Cummins[']s option, Diversified will pay Cummins Five Hundred Dollars (\$500.00) on or before September 15, 2003, and retain the engine core;

(2) Following Cummins'[s] receipt of the core, or its election to receive payment from Diversified as set forth above, Diversified may, at its option, order one (1) reconditioned industrial diesel engine during the calendar year 2003 from Cummins. Cummins shall provide that engine at their cost to Diversified. . . .

(3) Diversified may, at its option, order one (1) reconditioned industrial engine during the calendar year 2004 from Cummins. Cummins shall provide that engine at their cost to Diversified. . . .

. . .

(6) Following a signed, written agreement incorporating the above terms and conditions, the parties shall execute a mutual release and joint stipulation of dismissal regarding the pending claims and counterclaims.

Appellant's App. p. 10-11. Cummins cashed the enclosed check on August 22, 2003. On August 29, 2003, Cummins filed a notice of settlement with the trial court. Diversified prepared a draft of the settlement agreement, signed it, and mailed it to Cummins on September 8, 2003. Unbeknownst to Diversified, the settlement agreement contained a scrivener's error, which indicated that both reconditioned engines could be purchased by Diversified during the calendar year 2003.

Diversified's attorney, Stephen Sellmer, called Cummins's attorney, Fred Pfenninger, eight or nine times between September 26, 2004, and December 3, 2004, and sent a letter to discuss the settlement agreement. But Pfenninger did not return the phone calls or respond to the letter, and Cummins did not sign the settlement agreement. On December 17, 2003, Diversified filed a motion to enforce the settlement agreement and for sanctions. Thereafter, on February 6, 2004, Cummins signed the settlement agreement.

During the week of February 6, 2004, Sellmer first noticed the scrivener's error. Sellmer called Pfenninger to inform him of the error, which made the settlement agreement invalid because the time had already passed to exercise the option to purchase the refurbished engines under the signed agreement. Sellmer proposed that he redraft the settlement agreement so that it would comply with the terms and spirit of the original agreement. On February 12, 2004, Sellmer sent to Pfenninger a revised settlement agreement, allowing Diversified to purchase two reconditioned engines from Cummins at cost during the calendar year 2004. Sellmer called Pfenninger's office four or five times between February 12, 2004, and March 5, 2004, and Pfenninger informed Sellmer that he had not been able to reach his client to get the settlement agreement signed. Cummins did not sign the revised settlement

agreement.

On March 31, 2004, the trial court held a hearing on Diversified's motion to enforce the settlement agreement and for sanctions. At the hearing, no witnesses were called; only Sellmer and Pfenninger spoke, and they were not sworn in. On May 5, 2004, the trial court entered its judgment in favor of Diversified, enforcing the revised settlement agreement and awarding \$1,700 in attorney's fees to Diversified because Cummins "unreasonably and groundlessly continued this litigation" by failing to sign the settlement agreement. Appellant's App. p. 20.

Cummins Michigan, Inc. v. Great Lakes Drilling, Inc., No. 49A02-0407-CV-610, slip op. at 2-4 (Ind. Ct. App. Sept. 29, 2005). This Court affirmed the trial court, including the award of attorney's fees. Furthermore, that panel also granted the request for appellate attorney's fees based on its conclusion that Cummins Michigan's appeal was frivolous. The case was then remanded for the calculation of the appellate fees.

On remand, the trial court held a hearing on the calculation of appellate attorney's fees and Diversified's motion for rule to show cause, which alleged that Cummins Michigan refused to honor the settlement agreement. The hearing was held on October 24, 2005. The trial court found that Diversified twice attempted to obtain a reconditioned engine from Cummins Michigan. When the president of Diversified travelled to the former site of Cummins Michigan, the place of business was occupied by Cummins Bridgeway ("Bridgeway"). The Bridgeway employees with whom Diversified spoke had previously worked for Cummins Michigan. After Diversified's second attempt to obtain a reconditioned engine in March of 2005, it was informed by Bridgeway personnel that Bridgeway would no longer do business with Diversified. The trial court concluded that Cummins Michigan was in contempt of the order to provide the reconditioned engines as well as the order requiring the reimbursement of \$1700 in attorney's fees.

During this hearing the trial court elicited answers from Cummins Michigan's counsel, Pfenninger, as to why the company had not honored the settlement agreement. Pfenninger explained to the court that, while he had been Cummins Michigan's counsel since 2001, the company had since gone out of business. Furthermore, Pfenninger alleged that he had been unable to contact any representative of the company since January 2005. However, Pfenninger offered that he had been in contact with Bridgeway and that Bridgeway was now willing to sell the reconditioned engines and warranties to Diversified. Despite having information of this offer, Pfenninger professed ignorance as to the relationship between Cummins Michigan and Bridgeway. Finally, Pfenninger revealed that he had delivered the original settlement check, payable to Cummins Michigan, to NCO Financial Systems, Inc.

The trial court's order, entered on December 22, 2005, directed a judgment of \$24,079.93 against Cummins Michigan. Of that judgment, the trial court made Cummins Michigan's attorney, Pfenninger, jointly and severally liable for \$9079.93 due to Pfenninger's misconduct.

On January 23, 2006, Cummins Michigan filed a motion to correct error as to the October 24th Order. Diversified filed a motion to strike, which was granted by the court, due to the lack of timeliness of the motion to correct error. On March 24, 2006, Cummins Michigan filed a motion for relief of judgment pursuant to Trial Rule 60(B)(3). Attached to the motion were five affidavits of Bridgeway employees that claimed that Diversified never made requests to purchase reconditioned engines. Based on the assertions in the affidavits, Cummins Michigan accused the owner of Diversified of lying under oath at the October 24, 2005 hearing and requested relief from the judgment as well as attorney's fees.

On March 29, 2006, Diversified filed a motion to establish authority pursuant to Indiana Code Section 33-43-1-6.³ The trial court granted the motion, requiring a response by April 20, 2006. On April 25, 2006, Pfenninger filed his response that “[His law firm] was hired to represent its client Cummins Michigan Inc. by NCO Financial Systems Inc. which was acting as agent for Cummins Michigan Inc.” Appellant’s Appendix at 116. Only Pfenninger’s signature was on the filing. Subsequently, Diversified filed a motion for a stay of the proceedings until Pfenninger complied with the trial court’s order to establish authority.

Pfenninger then filed a similar response with the purported signature of Cummins Michigan’s CFO. Diversified then filed a motion to strike Pfenninger’s response because the signature of the CFO was illegible. The motion noted that such an assertion contradicted Pfenninger’s prior statements that Cummins Michigan was out of business since at least January of 2005 and that Pfenninger had been unable to contact any of the employees. The motion also noted that the response did not contain any contact information for Cummins Michigan or its CFO. The trial court granted the motion to strike and continued the stay of proceedings.

On November 28, 2006, Diversified filed a Motion for Sanctions pursuant to Trial Rule 37(B) against Pfenninger for failure to respond to interrogatories and a request for production of documents. Diversified also filed a Verified Motion to Enforce Judgment By Proceedings Supplemental. On December 14, 2006, Pfenninger filed his third Authority of

³ “The court or judge may . . . require an attorney to produce and prove the authority under which the attorney appears. The court may stay all proceedings by the attorney on behalf of the party for whom the attorney

Representation, notarized and signed by Kenneth Clark, CFO, of Cummins Michigan Inc. nka K & S Property Inc. Based on a motion to enforce judgment by Diversified, the trial court ordered Kenneth Clark to appear at a hearing on January 16, 2007, to answer questions of the assets of Cummins Michigan.

On January 8, Pfenninger filed a notice of depositions of Bridgeway employees to take place on the 12th in Michigan. That same day, Diversified moved to quash the notice of depositions and requested sanctions against Pfenninger. Diversified noted that the Bridgeway employees were available at the time of the October 2005 hearing and that Bridgeway was not a party to the action. Diversified alleged that Pfenninger set these depositions to annoy and burden Diversified as well as relitigate resolved issues. Diversified requested sanctions against Pfenninger for continuing to litigate in bad faith.

After the trial court set a hearing for the pending motions, Pfenninger filed a notice of deposition of Diversified's president as well as a request for production of documents. Diversified moved to quash these discovery requests and again requested sanctions against Pfenninger. Pfenninger then filed a motion for continuance of the hearing set for February 26. The trial court denied the motion for continuance and granted Diversified's motions to quash. Pfenninger filed another motion for continuance, which was granted and the hearing was rescheduled for March 19, 2007.

At the hearing, Diversified informed the trial court that it had entered into a settlement agreement with K&S Property, Inc., f/k/a Cummins Michigan Power, Inc. and that the only outstanding issues were regarding Pfenninger's conduct. Apparently, Pfenninger provided

assumes to appear until the attorney produces and proves authority to appear." Ind. Code § 33-43-1-6.

Diversified counsel's phone number to the general counsel of Bridgeway, who contacted Diversified and instructed Diversified to call Kenneth Clark. Diversified relayed to the trial court that in speaking with Clark, Clark claimed that, although he had been in contact with Pfenninger for the past year and one half, he was not aware of the judgment against Cummins, the subpoena for him to appear in court, or the outstanding interrogatories and request for production. When the trial court asked Pfenninger to explain the relationship between Cummins Michigan and Bridgeway, Pfenninger admitted that he did not know.

The trial court held that the issue of judgment against Cummins had been resolved by the settlement agreement. In addressing the motions for sanctions against Pfenninger, the trial court then attempted to elicit answers from Pfenninger as to why he had not replied to specific discovery requests of Diversified. None of Pfenninger's answers were responsive to any of the court's questions. Pfenninger's answers implied that interrogatories should be sent directly to a party and not the party's attorney and that once Cummins Michigan went out of business that he was unable to contact any officers as their addresses and phone numbers had been changed. Counsel for Diversified noted that Clark's address had not changed since the inception of the action, which was reflected in Pfenninger's own submissions to the trial court. After Pfenninger continuously failed to respond to questions posed, the trial court concluded the hearing. At a subsequent hearing that Pfenninger failed to attend, the trial court imposed sanctions against Pfenninger in the amount of three times the attorney's fees incurred by Diversified since January of 2005. The trial court issued its amended order on August 15, 2007.

On September 14, 2007, Pfenninger filed a Motion For Relief From Judgment

pursuant to Indiana Trial Rule 60(B)(3) and a Motion to Correct Error. The trial court held that the request for relief pursuant to T.R. 60(B) was improper form and struck it from the record. The Motion to Correct Error was deemed denied.

Pfenninger now appeals the imposed sanctions.

Discussion and Decision

I. Recusal

First, Pfenninger contends that the trial court judge should have recused himself from presiding over the August 6th sanctions hearing because Pfenninger attended the trial court judge's meeting with the Indiana Judicial Nominating Committee to oppose the possible nomination of the judge to the Court of Appeals. Pfenninger's attendance at this meeting occurred between the March 13th and the August 6th hearing. At this point in time, the trial court had made rulings adverse to Pfenninger. Also, it was also apparent at the end of the hearing on March 13 that the trial court judge was likely to impose sanctions against Pfenninger.

Counsel may not "lie in wait" to raise the issue of recusal only after learning of a court's ruling on the merits. National City Bank, Ind. v. Shortridge, 691 N.E.2d 1210, 1211 (Ind. 1998). As stated in his motion for relief from judgment and motion to correct error, Pfenninger attended the nominating hearing because he "had become upset with [the trial court's] decisions in this and 1 other case." Appellant's App. at 333. Pfenninger's request for recusal is based on his disagreement with the trial court's ruling on the merits rather than any impropriety on the part of the judge. The recusal request is without merit.

II. Hearing Notice

Second, Pfenninger claims that he was denied due process because he did not receive the notice of the hearing set for August 6, 2007. Trial Rule 72(D) provides:

Notice of Orders or Judgments. Immediately upon the entry of a ruling upon a motion, an order or judgment, the clerk shall serve a copy of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear and shall make a record of such mailing. . . .

It shall be the duty of the attorneys when entering their appearance in a case or when filing pleadings or papers therein, to have noted on the Chronological Case Summary and on the pleadings or papers so filed, their mailing address, and service by mail at such address shall be deemed sufficient.

A notation in the Chronological Case Summary satisfies this recording requirement.

Lodge of Wabash, Ltd. v. Sullivan, 654 N.E.2d 40, 42 (Ind. Ct. App. 1995), trans. denied.

Subsection (E) governs a party's claim of a failure to receive notice of a ruling:

Effect of Lack of Notice. Lack of notice, or lack of the actual receipt of a copy of the entry from the Clerk shall not affect the time within which to contest the ruling, order or judgment, or authorize the Court to relieve a party of the failure to initiate proceedings to contest such ruling, order or judgment, except as provided in this section. When the mailing of a copy of the entry by the Clerk is not evidenced by a note made by the Clerk upon the Chronological Case Summary, the Court, upon application for good cause shown, may grant an extension of any time limitation within which to contest such ruling, order or judgment to any party who was without actual knowledge, or who relied upon incorrect representations by Court personnel. Such extension shall commence when the party first obtained actual knowledge and not exceed the original time limit.

The Chronological Case Summary ("CCS") contained the following entries:

03/23/07	AFFIDAVIT IN SUPPORT OF AWARD OF ATTY FEES
06/25/07	06/25/07 JACKET ENTRY: ALL PLAINTIFFS MOTIONS ARE DENIED ISSUE OF ATYY [sic] FEES AWARDABLE DEFENDANT IS SET FOR EVIDENTIARY HEARING ON THE 08/06/07 AT 10:00 A.M.

06/25/07 FREE-FORM TEXT NOTICE WAS SENT TO P
FREDERICK PFENNINGER

06/25/07 FREE-FORM TEXT NOTICE WAS SENT TO STEPHEN
MICHAEL SELLMER

The CCS contains a notation regarding the notice of the ruling and hearing. This satisfies the recording and notice requirements. Moreover, Pfenninger had a duty to check the court records. Rees v. Panhandle Eastern Pipe Line Co., 452 N.E.2d 405, 410 (Ind. Ct. App. 1983). He should have understood that a later hearing would be necessary, as days after the March hearing that ended abruptly, counsel for Diversified filed an affidavit supporting its request for attorney's fees. Pfenninger does not claim that he failed to receive this affidavit. Therefore, Pfenninger received sufficient notice of the August 6, 2007 hearing and was not deprived of due process.

III. Sanction/Attorney's Fees⁴

Finally, Pfenninger contends that the trial court erred in trebling the sanction award without authority to do so.⁵ As discussed below, the trial court had the authority to impose the underlying award of attorney's fees pursuant to either Indiana Trial Rule 37 (B) or Indiana Code Section 34-52-1-1(b). Under either provision, a trial court's decision is reviewed for an abuse of discretion. See Brown v. Katz, 868 N.E.2d 1159, 1165 (Ind. Ct. App. 2007) (A trial court has broad discretion in ruling on issues of discovery, and we will reverse such a ruling only when the trial court has abused its discretion.); Stoller v. Totton,

⁴ Pfenninger also contends that Diversified never made a written submission to the trial court requesting attorney's fees. The record and the trial court's order clearly indicate that Diversified filed four separate motions for sanctions based on various conduct by Pfenninger.

833 N.E.2d 53, 55 (Ind. Ct. App. 2005) (The trial court’s decision to award attorney’s fees and the amount is reviewed for an abuse of discretion.), trans. denied. “An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court or when the trial court has misinterpreted the law.” Brown, 868 N.E.2d at 1165.

Although the order is otherwise detailed, it does not denote which statute or trial rule upon which the trial court bases the award. Only certain language in the order assists in determining under which authority the trial court intended to make the award. The order includes findings that “Pfenninger has filed numerous, unsupported and frivolous pleadings and discovery in bad faith” and “has continued to litigate this action after Cummins claims and/or defenses clearly became frivolous, unreasonable and groundless, as well as in bad faith.” Appellant’s App. at 22, 23. The order concludes that “[a]s a result of Pfenninger’s deceit as set forth herein, Diversified is entitled to triple damages.” Appellant’s App. at 23. These three passages indicate the following authority, respectively: Indiana Trial Rule 37(B) (Discovery Sanctions),⁶ Indiana Code Section 34-52-1-1(b) (Exception to General Costs Recovery Rule),⁷ and Indiana Code Section 33-43-1-8 (Deceit or Collusion by an Attorney).⁸

⁵ Pfenninger does not contest any findings of the trial court.

⁶ The prior version of the rule used the term “bad faith” regarding sanctions for abuse of the discovery process. Indiana Trial Rule 37(B) (1981). The current version does not incorporate the “bad faith” terminology. Instead, the basis for sanctions is when a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions, including “attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.” Indiana Trial Rule 37(B) (West 2008).

⁷ “In any civil action, the court may award attorney’s fees as part of the cost to the prevailing party, if the court finds that either party: . . . (2) continued to litigate the action or defense after the party’s claim or defense clearly became frivolous, unreasonable, or groundless; or (3) litigated the action in bad faith.” Ind. Code § 34-52-1-1(b).

Based on procedural requirements, only Trial Rule 37(B) and the Exception to the Recovery Rule are applicable to these circumstances.

“[T]he attorney deceit statute does not create a new cause of action but, instead, trebles the damages recoverable in an action for deceit.” Shepherd v. Truex, 823 N.E.2d 320, 327 (Ind. Ct. App. 2005) (quoting Loomis v. Ameritech Corp., 764 N.E.2d 658, 666-67 (Ind. Ct. App. 2002), trans. denied) (internal quotes omitted). Although a new cause of action is not created, the statute permits the person injured by the deceit or collusion to bring a civil action for treble damages. Ind. Code § 33-43-1-8. “[T]he injured party is required to allege and prove deceit rising to the level of a Class B misdemeanor and damages stemming therefrom.” Finney v. Relphorde, 612 N.E.2d 191, 192 (Ind. Ct. App. 1993). Here, an action for deceit was not filed by Diversified. Furthermore, no witnesses were sworn or subject to cross-examination at the hearing to present evidence to prove deceit on the part of Pfenninger. Therefore, without a complaint or proof of deceit to the level of a Class B misdemeanor, the proper procedures were not taken to obtain treble damages for deceit by Pfenninger.

The award then could have been pursuant to Trial Rule 37(B)⁹ and/or the Exception to the Recovery Rule. Each authority only mentions an award of the amount of attorney’s fees as opposed to damages that can be trebled. See T.R. 37(B)(6)(e) (“[T]he court shall require

⁸ “(a) An attorney who is guilty of deceit or collusion, or consents to deceit or collusion, with intent to deceive a court, judge, or party to an action or judicial proceeding commits a Class B misdemeanor. (b) A person who is injured by a violation of subsection (a) may bring a civil action for treble damages.” Ind. Code § 33-43-1-8.

⁹ Diversified requested sanctions pursuant to Trial Rule 37(B), so this is the strongest basis for the trial court’s award.

the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure[.]") and I.C. § 34-52-1-1(b) ("[T]he court may award attorney's fees as part of the cost to the prevailing party. . ."). Therefore, the trial court abused its discretion in trebling the award of \$14,398.58 because the applicable provisions only provide for a sanction or requirement of payment of attorney's fees. We remand to the trial court to modify its order to reflect a sanction in the amount of \$14,398.58 against Pfenninger.

At the end of its brief, Diversified requests appellate attorney's fees based on the contention that Pfenninger's appeal is groundless and his assertions are without merit. We assume that this request is pursuant to Indiana Appellate Rule 66(E), which provides in pertinent part, "[t]he Court may assess damages if an appeal . . . is frivolous or in bad faith. Damages shall be in the Court's discretion and may include attorney's fees." This discretion is limited to instances where an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness or purpose of delay. Stillwell v. Deer Park Management, 873 N.E.2d 647, 652 (Ind. Ct. App. 2007).

Pfenninger's appeal was not completely permeated with meritlessness as we reverse the trial court's trebling of the imposed sanction. Therefore, we decline Diversified's request for appellate attorney's fees.

Conclusion

In sum, the judge was not required to recuse himself because the basis of request was Pfenninger's disagreement with the trial court's ruling on the merits rather than any

impropriety on the part of the judge. Second, Pfenninger was not denied due process for the hearing on the amount of sanctions because the Chronological Case Summary reflects that notice of the hearing was sent to both parties. The trial court abused its discretion in trebling the sanction because the relevant authority did not provide for such. Finally, this appeal does not warrant an award of appellate attorney's fees for Diversified. We remand the case to the trial court to modify the amount of the sanction to \$14,398.58.

Affirmed in part, reversed in part, and remanded.

RILEY, J., and KIRSCH, J., concur.